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No. 08-1317

In the Supreme Court of the United States

GILBERT EMAN, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that petitioner failed to establish "changed circumstances" to excuse the untimely filing of his asylum application.

2. Whether the court of appeals erred in holding that substantial evidence supported the agency's determination that petitioner failed to establish eligibility for asylum.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 15

TABLE OF AUTHORITIES

Cases:

A-M -, In re, 23 I. & N. Dec. 737 (B.I.A. 2005) 6, 13, 15
Almuhtaseb v. *Gonzales*, 453 F.3d 743 (6th Cir. 2006) 9
Chacon-Botero v. *United States Att'y Gen.*, 427 F.3d 954 (11th Cir. 2005) 9
Chen v. *United States Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006) 9
Ferry v. *Gonzales*, 457 F.3d 1117 (10th Cir. 2006) 9
Haig v. *Agee*, 453 U.S. 280 (1981) 12
Higuit v. *Gonzales*, 433 F.3d 417 (4th Cir.), cert. denied, 548 U.S. 906 (2006) 12
Ignatova v. *Gonzales*, 430 F.3d 1209 (8th Cir. 2005) 9
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 7, 13, 14
Lie v. *Ashcroft*, 396 F.3d 530 (3d Cir. 2005) 15
Niang v. *Gonzales*, 492 F.3d 505 (4th Cir. 2007) 10, 11
Ramadan v. *Gonzales*, 479 F.3d 646 (9th Cir. 2007) ... 9, 10
Sukwanputra v. *Gonzales*, 434 F.3d 627 (3d Cir. 2006) 9, 12
Usman v. *Holder*, 566 F.3d 262 (1st Cir. 2009) 9

Cases—Continued: Page

Viracacha v. *Mukasey*, 518 F.3d 511 (7th Cir.), cert. denied, 129 S. Ct. 451 (2008) 9
Webster v. *Doe*, 486 U.S. 592 (1988) 12
Zhu v. *Gonzales*, 493 F.3d 588 (5th Cir. 2007) 9

Treaty, statutes and regulations:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1084, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 4
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(42)(A) 2
8 U.S.C. 1158(a)(2)(B) 2
8 U.S.C. 1158(a)(2)(D) 2, 11, 12
8 U.S.C. 1158(a)(3) 3, 7, 10, 11, 12
8 U.S.C. 1158(b)(1) 2
8 U.S.C. 1158(b)(1)(A) 2
8 U.S.C. 1158(b)(1)(B)(i) 2
8 U.S.C. 1158(d)(1) 3
8 U.S.C. 1227(a)(1)(C)(i) 4
8 U.S.C. 1252(a)(2) 3
8 U.S.C. 1252(a)(2)(D) ..... *passim*
8 U.S.C. 1252(b)(4)(B) 7, 13, 14
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 4
8 C.F.R.:
Section 1208.4(a)(2)(A) 2
Section 1208.4(a)(4)(i) 13

Regulations—Continued: Page

Section 1208.4(a)(4)(i)(A) 3
Section 1208.4(a)(4)(ii) 3
Section 1208.4(a)(5) 3
Section 1208.13(a) 2
Section 1240.8(d) 2

Miscellaneous:

H. R. Rep. No. 72, 109th Cong., 1st Sess. (2005) 12

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 288 Fed. Appx. 125. The decisions of the Board of Immigration Appeals (Pet. Supp. App. 9a-11a) and the immigration judge (Pet. Supp. App. 12a-20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2008. A petition for rehearing was denied on January 20, 2009. The petition for a writ of certiorari was filed on April 17, 2009. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA) provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a refugee within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

b. An alien who wishes to be granted asylum must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). An alien who fails to meet that requirement "may be considered" for asylum if he demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances" that materially affect his eligibility for asylum, or "extraordinary circumstances" that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence," that his application for asylum was filed within one year of his entry into the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2)(A).

The Attorney General, who is responsible for adjudicating asylum applications filed by aliens in removal proceedings, 8 U.S.C. 1158(d)(1), has defined the term "changed circumstances" by regulation to include, *inter alia*, "[c]hanges in conditions in the applicant's country of nationality." 8 C.F.R. 1208.4(a)(4)(i)(A). The Attorney General has defined "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction," including, *inter alia*, "[s]erious illness or mental or physical disability," "[l]egal disability," and "[i]neffective assistance of counsel." 8 C.F.R. 1208.4(a)(5). In addition to showing "changed circumstances" or "extraordinary circumstances," the applicant must show that he filed his asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

c. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination regarding whether the changed or extraordinary circumstances exception applies. 8 U.S.C. 1158(a)(3). In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. a. Petitioner is a native and citizen of Indonesia. Pet. App. 2a. He was admitted to the United States on a student visa, but he failed to maintain the conditions of his student status. Pet. Supp. App. 12a; Administrative Record (A.R.) 623-624. United States Immigration and Customs Enforcement therefore charged him with being removable as an alien who, after being admitted as a nonimmigrant, failed to maintain the conditions of his nonimmigrant status. A.R. 623-624; see 8 U.S.C. 1227(a)(1)(C)(i).

Petitioner conceded that he is removable as charged, and an immigration judge (IJ) found that he is removable. Pet. Supp. App. 12a. Petitioner sought asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong. 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. Supp. App. 13a; A.R. 446-456.

The IJ held a hearing, at which petitioner was the sole witness. Pet. Supp. App. 13a; A.R. 131-183. Petitioner claimed that he feared persecution in Indonesia because he is a Christian. Pet. Supp. App. 13a. He recounted one occasion when he was in Indonesia in which strangers asked to see his identification and he ran away from them. A.R. 169-170. Petitioner acknowledged that, other than that one occasion, he had never had any problems in Indonesia based on his religion. A.R. 108-109. He also explained that his parents and sister, who are also Christian, remain in Indonesia, where they attend weekly religious services. A.R. 142-143. Petitioner ac-

knowledged that Indonesian law protects all people against religious discrimination, but he stated that he believes Muslims, who are in the majority, receive preferential treatment. Pet. Supp. App. 14a; A.R. 62.

Petitioner also testified about his delay in filing the asylum application. Although he was last admitted to the United States in December 2000, he did not file his asylum application until October 2003. Pet. Supp. App. 12a-13a. Petitioner stated that he waited to file his application until that time because he did not become aware that he could apply for asylum until after he was first placed in removal proceedings. *Id.* at 15a; A.R. 149. He also stated that the series of bombings from 2000 to 2003—church bombings on Christmas Eve 2000, the bombing of a Bali nightclub in October 2002, and the bombing of a Marriott hotel in Jakarta in August 2003—constituted changed circumstances that excused his untimely filing. Pet. Supp. App. 14a-15a, 18a; A.R. 150-151.[1]

b. The IJ denied petitioner's applications for asylum, withholding of removal, and CAT protection. Pet. Supp. App. 12a-20a. First, the IJ determined that petitioner's asylum application was not filed within one year of his entry into the United States and that he had failed to demonstrate material changed circumstances that excused the untimely filing. *Id.* at 18a. The IJ explained that petitioner "clearly did not file within the one year time limit," and that the bombings from 2000-2003 did not constitute "changed circumstances" that materially affected his asylum application. *Ibid.* The IJ explained that the Board of Immigration Appeals

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[1] Petitioner did not argue that there are any extraordinary circumstances that excuse the untimely filing of his asylum application.

(Board) had rejected just such a changed circumstances argument in *In re A-M-*, 23 I. & N. Dec. 737 (B.I.A. 2005). Pet. Supp. App. 18a. The IJ also determined that, even if the bombings did constitute material changed circumstances in Indonesia, petitioner "did not file his asylum application within a reasonable time after he became aware of those incidents," because the bombings happened "over a year in advance of him filing his asylum application." *Ibid.*

The IJ then held, in the alternative, that petitioner failed to satisfy his burden of proving that he has a well-founded fear of future persecution on the basis of his religion. Pet. Supp. App. 18a-19a. The IJ found that petitioner was credible, *id.* at 17a, but also determined that "there is simply not enough evidence in [petitioner's] testimony or the record to demonstrate that there is in fact a pattern or practice of persecuting Christians in Indonesia," *id.* at 19a. Citing *In re A-M-*, the IJ observed that the existence of some "civil unrest and sectarian conflict" in Indonesia did not rise to the level of a systematic and pervasive pattern of persecution sufficient to demonstrate a well-founded fear of religious persecution. *Ibid.*

Finally, the IJ denied petitioner's claims for withholding of removal and CAT protection and granted him voluntary departure, stating that he was required to depart the United States by June 5, 2006. Pet. Supp. App. 19a-20a.[2]

3. The Board dismissed petitioner's appeal. Pet. App. 9a-11a. As relevant here, the Board "agree[d] with

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[2] Petitioner did not appeal the denial of CAT protection. Pet. Supp. App. 10a. The Board and the court of appeals rejected petitioner's claim for withholding of removal, Pet. App. 1a-2a; Pet. Supp. App. 10a, and petitioner does not renew that claim before this Court.

the Immigration Judge that [petitioner's] asylum application is time-barred." *Id.* at 9a. The Board explained that the "application was untimely filed," and petitioner "did not meet his burden of showing he qualified for an exception to the filing deadline." *Id.* at 9a-10a. And the Board noted that petitioner's arguments "are similar to those that [the Board] considered and rejected" in *In re A-M-*. *Id.* at 9a. The Board also determined that petitioner's claim for asylum failed on the merits, because he had not met his burden of "establish[ing] past persecution or a well-founded fear of persecution on account of a [protected] ground." *Id.* at 10a. The Board then stated that petitioner was required to voluntarily depart the United States within 60 days. *Ibid.*[3]

4. The court of appeals dismissed in part and denied in part petitioner's petition for review in an unpublished, non-precedential opinion. Pet. App. 1a-2a. First, the court held that it lacked jurisdiction under 8 U.S.C. 1158(a)(3) and 1252(a)(2)(D) to review the Board's determination that no changed circumstances excused petitioner's late filing of his asylum application. *Id.* at 2a.

In the alternative, the court of appeals rejected petitioner's asylum claim on the merits. Pet. App. 2a. It noted that, to obtain reversal, petitioner "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Ibid.* (quoting *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483-484 (1992)); see 8 U.S.C. 1252(b)(4)(B) (administrative findings of fact conclusive

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[3] Although petitioner sought and obtained a stay of removal pending consideration of his petition for review, he never sought a stay of his period of voluntary departure. To the best of the government's knowledge, petitioner did not depart within the time permitted and has remained in the United States illegally.

unless a reasonable adjudicator would be compelled to conclude to contrary). The court stated that it "reviewed the record and conclude[d] that [petitioner] fail[ed] to show that the evidence compels a contrary result." Pet. App. 2a.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the court of appeals erred in holding that it lacked jurisdiction to review the Board's conclusion that he failed to demonstrate material changed circumstances that would excuse the late filing of his asylum application. The question whether the courts of appeals retain jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the agency's decision that an asylum applicant failed to demonstrate "changed circumstances" or "extraordinary circumstances" to excuse the untimely filing of his application is a recurring issue that has led to some disagreement among the courts of appeals and may warrant this Court's review in an appropriate case. This is not an appropriate case, however, because the court of appeals' opinion is unpublished and thus did not create circuit precedent; because the court of appeals was correct in holding that it lacked jurisdiction to review petitioner's challenge to the denial of his request for asylum; and because resolution of the question regarding the scope of 8 U.S.C. 1252(a)(2)(D) likely would not change the outcome of petitioner's case.

a. The federal courts of appeals have disagreed about whether they have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the Board's determination that an alien failed to adduce sufficient facts to demonstrate "extraordinary circumstances" or "changed circumstances" to justify the untimely filing of an asylum appli-

cation. The First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that such a claim normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Usman* v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (extraordinary or changed circumstances); *Viracacha* v. *Mukasey*, 518 F.3d 511, 514-516 (7th Cir.) (changed or extraordinary circumstances), cert. denied, 129 S. Ct. 451 (2008); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006) (changed or extraordinary circumstances); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (changed circumstances); *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (extraordinary circumstances). Those courts have explained that a challenge to the Board's determination that an alien did not establish "changed circumstances" or "extraordinary circumstances" "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). *Chen*, 471 F.3d at 332.

The Ninth Circuit, in contrast, has held that an alien's challenge to the Board's determination that he has not established "changed circumstances" or "extraordinary circumstances" did raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007) (changed circumstances).

In the Ninth Circuit's view, the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Ramadan*, 479 F.3d at 650.

b. That disagreement in the courts of appeals may warrant this Court's attention in an appropriate case. This is not an appropriate case, however, for four reasons.

First, the decision below is unpublished and does not create circuit precedent. See Pet. App. 1a. It therefore does not itself give rise or contribute to the type of disagreement in published opinions that warrants this Court's review. Moreover, the court did not address whether petitioner's claim raises a "question[] of law" in any detail. Rather than discuss the circumstances in which an issue involving a late-filed asylum application might raise a "question[] of law" allowing the exercise of jurisdiction, the court simply stated that it "lack[ed] jurisdiction to review this determination pursuant to 8 U.S.C. § 1158(a)(3) (2006), even in light of the passage of the REAL ID Act of 2005." Pet. App. 2a. To the best of the government's knowledge, the Fourth Circuit has not addressed the question presented here in any published decision.[4]

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[4] In *Niang* v. *Gonzales*, 492 F.3d 505 (4th Cir. 2007), the court of appeals stated that it would lack jurisdiction to review a challenge to the agency's decision that an asylum application was untimely under 8 U.S.C. 1158(a)(3). *Id.* at 510 n.5. But that statement was dictum, because the court found that the alien had waived any such challenge. *Ibid.* Moreover, the court did not address the question whether a challenge to the Board's determination that an alien has not established "changed circumstances" or "extraordinary circumstances" would raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D); indeed, the court did

Second, the court of appeals correctly determined that it lacked jurisdiction over petitioner's fact-bound claim because it does not raise a "question[] of law." Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding an exception to the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant has not "demonstrate[d] to the satisfaction of the Attorney General * * * the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing," 8 U.S.C. 1158(a)(2)(D). As petitioner acknowledges (Pet. 6-7), his petition for review challenged a determination that his asylum application was untimely and that he had failed to demonstrate changed circumstances to justify that untimely filing. Judicial review of petitioner's claim is therefore barred under 8 U.S.C. 1158(a)(3) unless the exception for "questions of law" in 8 U.S.C. 1252(a)(2)(D) applies.

The court of appeals correctly held that petitioner's challenge to the Board's fact-bound, discretionary determination did not raise a "question[] of law." In this case, the governing rules of law are undisputed; the Board rejected petitioner's changed circumstances argument because it found that petitioner failed to demonstrate, on the particular facts of his case, that there had been a change in conditions in Indonesia that was material to his asylum application. Pet. Supp. App. 9a-10a. That determination is not a legal determination, but a factual determination. If petitioner's fact-bound challenge to the Attorney General's discretionary determination

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not mention 8 U.S.C. 1252(a)(2)(D) at all. *Ibid.* And the decision below did not rely on *Niang*. Pet. App. 2a.

raised a "question[] of law," then any error any agency could make might be a question of law, thereby rendering the jurisdictional bar in 8 U.S.C. 1158(a)(3) meaningless. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (courts "are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive"), cert. denied, 548 U.S. 906 (2006).

Moreover, the question whether petitioner demonstrated "changed circumstances" to justify an untimely filing is a question committed to the Attorney General's discretion, and such a discretionary determination does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). The text of the INA states that the Attorney General "may" consider an untimely asylum application if the alien demonstrates changed or extraordinary circumstances "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). Congress's use of the word "may" "expressly recognizes substantial discretion," *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981), and the phrase "to the satisfaction of the Attorney General" demonstrates Congress's expectation that the Attorney General's assessment "entails an exercise of discretion," *Sukwanputra*, 434 F.3d at 635. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). A challenge to a discretionary determination by the Attorney General is precisely the type of claim over which Congress intended to withhold jurisdiction under 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, H.R. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005) (Section 1252(a)(2)(D) was intended "to permit judicial review over those issues that were historically reviewable on habeas," namely "constitutional and statutory-construction questions, *not discretionary or factual*

questions" (emphasis added)). Because petitioner's claim is a fact-bound challenge to a determination that is in any event discretionary, it does not raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D), and the court of appeals therefore correctly determined that it lacked jurisdiction to consider it.

Third, even if there were jurisdiction, petitioner could not show that the agency erred in refusing to consider his untimely asylum application. If the court of appeals were to consider the timeliness question, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). Petitioner has not shown that the Board's determination that he failed to adduce facts sufficient to show changed circumstances was unsupported by substantial evidence. As the Board explained in *In re A-M-*, 23 I. & N. Dec. 737, 738 (B.I.A. 2005), which was cited by the Board below (Pet. Supp. App. 9a), the nightclub bombing in Bali in 2002 did not automatically qualify as a "changed circumstance" for any Indonesian native. Although that event was "undoubtedly a tragic event for nearly all Indonesians," an alien seeking to avoid the one-year asylum filing deadline must demonstrate how the bombing "materially affected or advanced his asylum claim." 23 I. & N. Dec. at 738 (citing 8 C.F.R. 1208.4(a)(4)(i)). Petitioner has not made such a showing.

Moreover, even if the bombings constituted changed circumstances, the IJ found that petitioner had not filed his application within a reasonable period of time in light of those circumstances. Pet. Supp. App. 18a. The Board affirmed that finding, *id.* at 10a, and petitioner did not

challenge that finding before the court of appeals. For this reason alone, petitioner cannot demonstrate that he merits an exception to the one-year asylum filing deadline.

Finally, petitioner's asylum claim fails on the merits. As explained below, the Board determined that petitioner failed to show a well-founded fear of persecution in Indonesia based on his religion, and the court of appeals determined that substantial evidence supported that holding. Because there is no reasonable prospect that petitioner could prevail on the merits of his claim, this case would provide a poor vehicle to review the jurisdictional question.

2. Petitioner also contends (Pet. 9-12) that the court of appeals erred in holding that substantial evidence supports the Board's finding that he had not met his burden of proof for asylum. There is no disagreement in the circuits on that issue. Instead, petitioner merely challenges the court of appeals' application of the familiar substantial evidence standard to the facts of his particular case.

Under the substantial evidence standard, petitioner must show that the evidence in the record compels the conclusion that he is eligible for asylum, *Elias-Zacarias*, 502 U.S. at 483-484; see 8 U.S.C. 1252(b)(4)(B) ("administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"). Petitioner did not testify about any instances in which he or his family members in Indonesia actually were harmed based on their religion, and it is well-established that mere harassment does not rise to the level of persecution. A.R. 108-109, 169-170 (petitioner's testimony that he had only feared harassment based on his religion on one occasion, when a stranger

asked him for identification); see *In re A-M-*, 23 I. & N. Dec. at 740. Moreover, petitioner did not demonstrate that there is systematic, pervasive persecution in Indonesia of Christians by individuals or groups the government is unwilling or unable to control. A.R. 65 (petitioner's acknowledgment that the Indonesian government protects against religious discrimination); see, *e.g.*, *In re A-M-*, 23 I. & N. Dec. at 741; see also, *e.g.*, *Lie* v. *Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005) (harm must be inflicted by person or persons that the government is unwilling or unable to control to constitute persecution under the asylum laws). The court of appeals' straightforward application of the substantial evidence standard to the facts of petitioner's case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2009